

**EXHIBIT 4**

**FILED UNDER SEAL**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

CASE NUMBER: 16-cv-1054 (WMW/DTS)

-----  
Fair Isaac Corporation, a Delaware corporation,  
Plaintiff,  
versus  
Federal Insurance Company, and Indiana  
corporation, and ACE American Insurance Company, a  
Pennsylvania corporation,  
Defendants.  
-----

VIDEOTAPED DEPOSITION OF EXPERT WITNESS

STEVEN KURSH

TAKEN: 25 June 2019

BY: Jackie McKone

<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 MERCHANT GOULD</p> <p>4 80 South Eighth Street, Suite 3200</p> <p>5 Minneapolis, Minnesota 55402</p> <p>6 PHONE: (612) 332-5300</p> <p>7 FAX: (612) 332-9081</p> <p>8 E-MAIL: hkliebenstein@merchantgould.com</p> <p>9</p> <p>10 BY: Heather Kliebenstein</p> <p>11 For the Plaintiff</p> <p>12</p> <p>13 FREDRIKSON BYRON</p> <p>14 200 South Sixth Street, Suite 4000</p> <p>15 Minneapolis, Minnesota 55402</p> <p>16 PHONE: (612) 492-7000</p> <p>17 FAX: (612) 492-7077</p> <p>18 E-MAIL: tfleming@fredlaw.com</p> <p>19</p> <p>20 BY: Terrence Fleming</p> <p>21 For the Defendants</p> <p>22</p> <p>23 Also present:</p> <p>24 James Woodward, FICO</p> <p>25</p> <p>26 Videographer: Kyle Peterson, Paradigm</p>	<p style="text-align: right;">Page 4</p> <p>1 P R O C E E D I N G S</p> <p>2 The following is the videotaped deposition</p> <p>3 of expert witness Steven Kursh taken at Merchant</p> <p>4 Gould, 80 South Eighth Street in Minneapolis,</p> <p>5 Minnesota commencing at 9:36 a.m. on 25 June 2019</p> <p>6 pursuant to notice.</p> <p>7 * * *</p> <p>8 THE VIDEOGRAPHER: Good morning we are</p> <p>9 going on the record. The time is 9:36 a.m. 0</p> <p>10 Today's date is June 25th, 2019.</p> <p>11 Please note that the microphones are</p> <p>12 sensitive. They pick up whispering private</p> <p>13 conversations, cellular interference. Please turn</p> <p>14 off all cellphones or place them away from the</p> <p>15 microphones as they can interfere with the</p> <p>16 deposition's audio. Audio and video recording</p> <p>17 will continue to take place unless all parties</p> <p>18 agree to go off the record.</p> <p>19 This is Media Unit 1 of the video recorded</p> <p>20 deposition of Steven Kursh taken by counsel for</p> <p>21 the plaintiff in the matter of Fair Isaac</p> <p>22 Corporation versus Federal Insurance Company et</p> <p>23 al. filed in the United States District Court,</p> <p>24 District of Minnesota. This deposition is being</p> <p>25 held at Merchant and Gould PC located at 80 South</p>
<p style="text-align: right;">Page 3</p> <p>1 I N D E X</p> <p>2</p> <p>3 Examination by Ms. Kliebenstein, Page 6</p> <p>4</p> <p>5 E X H I B I T S</p> <p>6</p> <p>7 Exhibit 513 Kursh expert report, Page 7</p> <p>8 Exhibit 514 Ruling/Kursh testimony, Page 49</p> <p>9 Exhibit 515 Ruling/Kursh testimony, Page 49</p> <p>10 Exhibit 516 Sizing matrix, Page 96</p> <p>11</p> <p>12 PREVIOUSLY MARKED EXHIBITS</p> <p>13</p> <p>14 Exhibit 314 Software agreement, Page 119</p> <p>15 FICO 0002276-2296</p> <p>16 Exhibit 421 Global price list, Page 80</p> <p>17 FICO 0057386-7412</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 Eighth Street, Suite 3200, Minneapolis, Minnesota</p> <p>2 55402.</p> <p>3 My name is Kyle Peterson from the firm</p> <p>4 Veritext Legal Solutions. I'm the videographer.</p> <p>5 The court reporter is Jackie McKone from the firm</p> <p>6 Veritext Legal Solutions. I am not authorized to</p> <p>7 administer an oath. I'm not related to any</p> <p>8 party in this action or am I financially</p> <p>9 interested in the outcome.</p> <p>10 Counsel would you please identify</p> <p>11 yourselves and the parties you represent.</p> <p>12 MS. KLIEBENSTEIN: Heather Kliebenstein for</p> <p>13 Merchant Gould on -- on behalf of the plaintiff.</p> <p>14 MR. FLEMING: Terry Fleming of the</p> <p>15 Fredrikson firm representing defendants.</p> <p>16 MS. KLIEBENSTEIN: Terry, did you -- are we</p> <p>17 good on the screen? Did you just look through the</p> <p>18 video?</p> <p>19 MR. FLEMING: I did.</p> <p>20 MS. KLIEBENSTEIN: Okay.</p> <p>21 MR. FLEMING: Yeah.</p> <p>22 THE VIDEOGRAPHER: Would the reporter</p> <p>23 please swear in the witness, and then we can</p> <p>24 proceed.</p> <p>25 * * *</p>

Page 178

1 have got the nine factor application sizing grid,  
 2 which supposedly guides the pricing, and yet in  
 3 actuality, at least in regard to this matter, Mr.  
 4 Waid and his team, and I do not mean this in a  
 5 derogatory way, priced on other factors as well  
 6 but looking just as transactions, and CSI Express  
 7 as an example, yes, that's what I did, but  
 8 nonetheless you can compare the number of  
 9 transactions to the grid and use CSI Express as  
 10 well.  
 11 Q. You say priced based on transactions. Can you  
 12 identify for me in Exhibit 16 which column of  
 13 transactions you were referring to?  
 14 A. I looked at both the average number per month and  
 15 the average number per day.  
 16 Q. Now, taking CSI Express specifically, do you know  
 17 whether or not the average number per month of  
 18 realtime transactions for CSI Express in Exhibit  
 19 16 is that number the same for the average  
 20 realtime transactions per month for the CSI policy  
 21 renewal application back in 2006?  
 22 A. You'll need to show me on this chart. Again, I'm  
 23 looking at CSI Express. I don't see CSI policy  
 24 renewal on the chart.  
 25 Q. Well, look back at Exhibit 13. In the middle

Page 179

1 second paragraph, it says, "I have qualified the  
 2 license as .net or dot," -- "or Java, and that it  
 3 pertains only to CSI policy renewal application,  
 4 and that it qualifies as a small application at  
 5 \$200,000."  
 6 A. Okay, but I don't see it in the chart here in  
 7 Exhibit 16, the interrogatory response.  
 8 Q. So how can exhibit -- how can -- how can --  
 9 A. The only place you see CSI -- sorry.  
 10 MR. FLEMING: Wait for the question.  
 11 BY MS. KLIEBENSTEIN:  
 12 Q. How can Exhibit 13 then provide a basis on which  
 13 to price the CSI Express application in 2019?  
 14 A. The way to price -- Mr. Bakewell goes through his  
 15 analysis with respect to pricing. I didn't do  
 16 damages. So I think your question is more  
 17 appropriately put forth to him.  
 18 Q. In Exhibit 17, you identified CSI Express as a  
 19 small application; correct?  
 20 A. Correct. Exhibit -- right. Exhibit 17. Yes.  
 21 Q. What supports that opinion? What evidence?  
 22 A. It's my understanding, again, from Exhibit 13, and  
 23 that there is no other CSI that that is -- and  
 24 there is no example of CSI otherwise in Exhibit 16  
 25 among the applications I assumed those to be with

Page 180

1 respect to pricing the same.  
 2 Q. So you're assuming CSI policy renewal and CSI  
 3 Express are the same applications?  
 4 A. With respect to pricing, and again, even if we  
 5 were to make CSI Express using the same chart of  
 6 the number of transactions and the nine factor  
 7 application grid, you'll find that the answers --  
 8 again, it would -- if it's -- if I made a mistake,  
 9 again, I stand corrected. I saw no evidence in  
 10 the documents that those were different, but if it  
 11 is, that's fine. We could then use CSI Express  
 12 using the average number of transactions, using  
 13 the nine factor grid and it comes out as medium,  
 14 and the net effect on the pricing after you  
 15 consider enterprise licensing -- remember, this is  
 16 an enterprise license, not an application license,  
 17 and I discuss that in my report, as well as the  
 18 discounts, and Mr. Zoltowski ignored those in his  
 19 work, ignored the enterprise license, ignored the  
 20 discounts, as well as made other issues. As I  
 21 discuss in my report.  
 22 Q. Do you know whether or not --  
 23 A. Made other assumptions based on the data he was  
 24 given by Mr. Waid, Mr. Zoltowski did not do any  
 25 indication -- any independent verification of that

Page 181

1 data.  
 2 Q. Doctor Kursh, my questions aren't about other  
 3 people, other opinions. My questions are about  
 4 your opinions, and my next question this. Let's  
 5 look at Paragraph 109.  
 6 Do you have any information as to the  
 7 average number per month realtime transactions  
 8 that went through this CSI application referenced  
 9 in Paragraph 109 in 2006?  
 10 A. And your question is what again please?  
 11 Q. For the CSI application from June 2006 that's  
 12 referenced in Paragraph 109, do you have any data  
 13 on the transactions that went through that  
 14 application at that time in 2006?  
 15 A. What I have is among the evidence, there may be  
 16 other evidence, that -- if you take a look at  
 17 Bates Number FICO 0002286, it states in the second  
 18 sentence, "The application currently known as CSI  
 19 Express," open paren, "which is Chubb's specialty  
 20 insurance underwriting an automated policy renewal  
 21 application and its supporting system  
 22 applications, excluding claims, point of sale data  
 23 capture, billing and marketing applications," and  
 24 I see a license fee charged of 173750. That's  
 25 what I used in my work.

<p style="text-align: right;">Page 182</p> <p>1 Now, if you take a look at the Blaze</p> <p>2 capability in Exhibit 16, under CSI Express, it</p> <p>3 says predictive modeling, it says underwriting</p> <p>4 guidance, and that ties into what is defined as</p> <p>5 the named application called then CSI Express.</p> <p>6 The 173750.</p> <p>7 Q. That wasn't my question.</p> <p>8 A. I'm sorry.</p> <p>9 Q. My question was: Do you have any data on the</p> <p>10 number of realtime transactions that went through</p> <p>11 CSI in 2006?</p> <p>12 A. I don't recall seeing any evidence in that regard</p> <p>13 as I sit here.</p> <p>14 Q. And looking at the sizing chart, a small</p> <p>15 application would have about 2000 peak rule</p> <p>16 transactions per day; is that right?</p> <p>17 A. That's correct.</p> <p>18 Q. And does it appear today that CSI Express has 2000</p> <p>19 peak rule transactions per day?</p> <p>20 A. Well, if you take the -- I would need to look at</p> <p>21 the discovery response, Number 89, and so I can't</p> <p>22 answer that as I sit here.</p> <p>23 Q. Isn't Exhibit 16 the discovery response to RFP 89?</p> <p>24 A. Yes. Again, I would have to look at this, and I</p> <p>25 would need -- I'll go back and look.</p>	<p style="text-align: right;">Page 184</p> <p>1 client, FICO, to exclude in his damages</p> <p>2 calculations standard price discounts, tying</p> <p>3 together licensing attributes with the merger,</p> <p>4 their own sizing methodology, enterprise versus</p> <p>5 applications. He didn't consider enterprise, and</p> <p>6 yet Mr. Waid in his own testimony says that. He</p> <p>7 ignores, again, the fact that what the license</p> <p>8 provides is a enterprise-wide license on a global</p> <p>9 basis, and he incorrectly assumes applications.</p> <p>10 It's all in my report. It's commercially</p> <p>11 unreasonable for Mr. Zoltowski based solely on Mr.</p> <p>12 Waid's work to come forward and do that damages</p> <p>13 work. As to the specifics of pricing, again,</p> <p>14 that's Mr. Bakewell's province. I'm not a damages</p> <p>15 -- I'm not providing a damages analysis in this</p> <p>16 litigation.</p> <p>17 Q. I'm trying to drill down on whether you're</p> <p>18 providing affirmative opinions on the sizing</p> <p>19 Federal applications. Are you or aren't you?</p> <p>20 A. I'm providing an affirmative opinion with the</p> <p>21 sizing of the applications which ties into the</p> <p>22 number of transactions is inconsistent by FICO</p> <p>23 throughout this litigation. It is commercially</p> <p>24 unreasonable for FICO not to provide its specific</p> <p>25 methodology that can be replicable on sizing which</p>
<p style="text-align: right;">Page 183</p> <p>1 Q. So in preparing your opinions, you did not base</p> <p>2 your opinions on the sizing data from 2019;</p> <p>3 correct?</p> <p>4 A. Actually, in preparing my opinions, I was looking</p> <p>5 at Mr. Zoltowski's report, and Mr. Zoltowski used</p> <p>6 information provided to him by Mr. Waid. As to</p> <p>7 where Mr. Waid got that information from, again,</p> <p>8 there was no discussion of that in Mr. Waid's</p> <p>9 deposition as to his specific methodology that</p> <p>10 could be replicable, but Mr. Zoltowski used and</p> <p>11 took Mr. Waid's information whole cloth. He did</p> <p>12 not do his own analyses, and I was rebutting Mr.</p> <p>13 Zoltowski.</p> <p>14 Q. But you're not providing an affirmative opinion on</p> <p>15 the pricing of -- you're not providing an</p> <p>16 affirmative opinion on the sizing of Federal</p> <p>17 applications; isn't that right?</p> <p>18 A. My opinion, which is in my report, is that it was</p> <p>19 commercially unreasonable for FICO through its</p> <p>20 expert damages expert to make assumptions that are</p> <p>21 inconsistent with FICO's practices regarding its</p> <p>22 pricing. Even assuming that I made a mistake, and</p> <p>23 again, I'm human, I make mistakes, that doesn't</p> <p>24 change my opinion that was commercially</p> <p>25 unreasonable for Mr. Zoltowski on behalf of his</p>	<p style="text-align: right;">Page 185</p> <p>1 then ties into pricing that's commercially -- and</p> <p>2 along with other factors that I discuss in that</p> <p>3 section of my report.</p> <p>4 Q. Well, isn't your sizing of CSI Express as small in</p> <p>5 2019 inconsistent with the number of transactions</p> <p>6 that are reflected in Exhibit 16?</p> <p>7 A. I have two comments. Yes, it appears it to be,</p> <p>8 and second, it doesn't matter. Even if I made the</p> <p>9 mistake there, it doesn't matter to my overall</p> <p>10 opinion.</p> <p>11 There are a host of other factors which</p> <p>12 support my opinion that it was commercially</p> <p>13 unreasonable for Mr. Zoltowski on behalf of FICO</p> <p>14 to make those assumptions in his damages work</p> <p>15 because that's not how software -- again, customs</p> <p>16 and practices in the industry.</p> <p>17 If you don't price on applications, you</p> <p>18 price on enterprise. You give discounts just like</p> <p>19 FICO does. It's not just customs and practice in</p> <p>20 the industry. It's also FICO's own historic</p> <p>21 practices. That's what I'm providing an opinion</p> <p>22 on.</p> <p>23 Q. Exhibit 22 on Page 44 --</p> <p>24 A. One more question, and then I'd like a break.</p> <p>25 Okay. I'm there.</p>

<p style="text-align: right;">Page 186</p> <p>1 Q. Your sizing of the Federal international 2 applications is also predicated on your sizing of 3 CSI Express from 2019 as a small application; is 4 that correct?</p> <p>5 A. Exhibit 22 is more than that because Mr. Zoltowski 6 used software applications on an international 7 basis that do not use Blaze. That's commercially 8 -- and so that's part of what Exhibit 22 does, and 9 yes, I size them using CSI Express, and again, 10 even if we size them correctly, it doesn't matter. 11 My opinion remains the same. If I made a mistake, 12 the opinion is still the same, i.e., what I 13 discuss in Section C in regard to Mr. Zoltowski's 14 work on behalf of FICO.</p> <p>15 MS. KLIEBENSTEIN: Okay. We can take a 16 break.</p> <p>17 THE WITNESS: Thank you.</p> <p>18 THE VIDEOGRAPHER: We are going off the 19 record, and the time now is 4:23 p.m. 0 20 (Whereupon a short break was taken from 21 4:23 p.m. to 4:30 p.m.) 0 22 THE VIDEOGRAPHER: We are back on the 23 record. This marks the beginning of Media 6 in 24 the deposition of Steven Kursh. The time now is 25 4:30 p.m. 0</p>	<p style="text-align: right;">Page 188</p> <p>1 A. The situation where, let's say for example, an 2 audit is done, a true-up, and it is discovered 3 that the licensee has made some mistakes in 4 reporting among usage, that the parties would come 5 together and negotiate additional licensing fees.</p> <p>6 Additionally another example would be here. 7 When the parties get together, given that there's 8 an enterprise license, then they would continue to 9 have an enterprise license. It would be unusual, 10 although it may happen, that the grant of the 11 license -- as the licensee, you would want the 12 grant of rights by the licensor to enable you to 13 continue doing business the same way you're doing 14 business, and as a licensor, the licensor can 15 decide what it wants to do, but relative to 16 customs and practices in the industry, you want 17 the parties to come together and negotiate, and it 18 would typically be in enterprise lawsuits.</p> <p>19 Q. Is it your opinion that the parties would do that 20 today. Or is your opinion based in 2016?</p> <p>21 A. I don't understand your question.</p> <p>22 Q. Well, I'm just trying to understand. We've had 23 three years, three-plus years of litigation. Is 24 it your opinion that today FICO should do an audit 25 and give Federal an enterprise-wide license?</p>
<p style="text-align: right;">Page 187</p> <p>1 BY MS. KLIEBENSTEIN: 2 Q. Is it your opinion that after this lawsuit was 3 filed Federal would have negotiated with FICO to 4 purchase an enterprise license for Blaze Advisor 5 instead of purchasing licenses on an application 6 by application basis?</p> <p>7 A. I've seen e-mail discussions -- this goes to Ms. 8 Tamara's -- Pawloski, in her deposition, some of 9 the back and forth. I can't speak on behalf of 10 what the thinking was from either FICO personnel, 11 or Federal.</p> <p>12 However given that an enterprise license 13 existed from December 2006, one would expect that 14 they would have -- they being both sides would 15 have done an enterprise license.</p> <p>16 Additionally as I noted earlier, Mr. Waid's 17 testimony in regard to applications versus 18 enterprise license also is there. If I may 19 rephrase, it would be enterprise licenses.</p> <p>20 Q. In Paragraph 126, the report states, "Most 21 enterprises would typically purchase enterprise 22 level licenses in this situation." Is that your 23 opinion?</p> <p>24 A. Yes.</p> <p>25 Q. And what do you mean by in this situation?</p>	<p style="text-align: right;">Page 189</p> <p>1 A. You've got a bunch of different issues in there. 2 If you could ask me different specific questions, 3 I'll do my best to answer.</p> <p>4 Q. In providing your opinion that most enterprises in 5 this situation would typically purchase enterprise 6 level licenses, are you presuming 10.8 is breached 7 or not?</p> <p>8 A. I'm assuming -- again, Paragraph 126 is in my 9 rebuttal to Mr. Zoltowski's report. Mr. Zoltowski 10 didn't consider enterprise licenses.</p> <p>11 When the party -- if -- Mr. Zoltowski in 12 doing his damages work, in my view, consistent 13 with customs and practices in the industry, 14 licensees and licensors have enterprise licenses 15 will continue to do so. Mr. Zoltowski provided, 16 nor did any of your other experts, provide any 17 reasoning nor evidence from filings by the parties 18 that would indicate it would be anything other 19 than an enterprise license.</p> <p>20 Now, that's the damages work, but you asked 21 me a different question before about what the 22 parties could or should have done, and if you ask 23 that question again, I will do my best to answer 24 it, but that's different than what Mr. Zoltowski 25 assumed, which is what I'm addressing in Paragraph</p>